IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 124

NORVELL H. LILLY,

Petitioner,

vs.

GRAND TRUNK WESTERN RAILROAD COMPANY, A CORPORATION,

Respondent.

Brief for Petitioner.

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I.

OPINION OF COURT BELOW.

The opinion of the Appellate Court of Illinois is reported in *Lilly* v. *Grand Trunk Western Railroad Company*, 312 Ill. App. 73, 37 N. E. (2d) 888. It will also be found in the Record, page 131 *et seq.*

II.

STATEMENT OF JURISDICTIONAL GROUNDS.

This action is predicated upon the Employers' Liability Act and the Locomotive Boiler Inspection Act of the United States.

The train involved carried interstate commerce (R. 14) and both the trial and appellate courts found that the rights and liabilities of the parties were to be determined by the federal statutes. The judgment of the Appellate Court of Illinois sought to be reviewed was entered November 28, 1941 (R. 139). The petition for leave to appeal to the Supreme Court of Illinois was denied by that court on March 13, 1942 (R. 163-4), making the judgment of the Appellate Court final. The jurisdiction of this Court, which granted a Writ of Certiorari on October 12, 1942, is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, and cases believed to sustain jurisdiction are *Chesapeake & O. R. Co.* v. *Mihas*, 280 U. S. 102, and *Chicago G. W. R. Co.* v. *Rambo*, 298 U. S. 99.

III.

STATEMENT OF THE CASE.

A. Procedural History.

This action was brought to recover damages for personal injuries sustained by petitioner, a brakeman employed in interstate commerce, at Ferndale, Michigan, on February 6, 1937. The petitioner fell from the tender of a locomotive while he was pulling a water spout over the manhole by means of a long pole, preparatory to filling the tank with water. The accident resulted when the pole and its hook slipped on the water spout and his feet simultaneously slipped on ice on the top of the tender.

A general verdict of $32,500.00 was returned by the jury and sustained by the trial Court (R. 8, 115), but upon appeal by respondent the Appellate Court of Illinois ordered judgment in favor of respondent notwithstanding the verdict. The severity of petitioner's injuries was such

that the amount of the verdict was not questioned either in the trial court or upon appeal.

B. The Pleadings.

Insofar as presently material the complaint charged general negligence with respect to the presence of the ice on the tender (R. 3-4) and, further, alleged a violation of those provisions of the Safety Appliance Acts more properly referred to as the Boiler Inspection Act in two separate and specific respects:

> Paragraph 4, d. That by reason of ice and other slippery materials the tender was in an improper condition and was unsafe to operate in the service without unnecessary peril to life and limb (R. 4);
>
> Paragraph 4, e. That by reason of a crack or hole which permitted leakage, the tender was in an improper condition and was unsafe to operate in the service without unnecessary peril to life and limb (R. 6).

Respondent denied the above charges and pleaded assumption of risk and contributory negligence as complete defenses. At its request, a special interrogatory was submitted to the jury (R. 114) and answered in the negative, inquiring as to whether there was any leak near the manhole collar. The Appellate Court accorded a finality to the jury's answer which it was unwilling to give the verdict on the other fact issues in the case. For present purposes we will assume *arguendo* that the answer to the interrogatory eliminates from the case any claim of defect in the tender itself, leaving such questions only as arose from the presence of the ice upon the tender from negligent causes as a violation of the Boiler Inspection Act and as common law negligence.

The special interrogatory related solely to charge "e." above and the Appellate Court of Illinois either inadvertently overlooked or purposely ignored the application of the Boiler Inspection Act to charge "d." above. It seems clear as indicated by the trial Court (R. 115) that the answer to this interrogatory in no wise removed the charge that the Safety Appliance Act or the Boiler Inspection Act had been violated because the tender was unsafe due to ice resulting from the negligence of another servant.

C. Statement of Facts.

The main line of the Grand Trunk Western Railroad Company runs in an easterly and westerly direction through Ferndale, Michigan. The run upon which petitioner was working extended for about 60 miles from Detroit to Durand in the State of Michigan. The train was known as No. 481 with engine No. 3521. The engine and crew left Durand the day before, went to Detroit with the train and laid over night, and were making the return trip to Durand at the time of the accident.

On the morning of February 6, 1937, petitioner was called for work as a brakeman on this local way freight (R. 12). His crew left Detroit at about 7:15 A. M. with their engine and caboose and went to the Ferndale yards where they made up their train (R. 12-13). The tender had been filled with water by the hostler or his helper before leaving the Detroit roundhouse that morning (R. 21-22, 139). No water was put in the tank after leaving the roundhouse (R. 21).

The crew then made up the train by various switching operations (R. 12-13), and when it was completed and ready to leave for Durand, the engineer decided to take water before their departure, ordering petitioner to uncouple the engine so it could be taken to the water spout

(R. 13). When the engine arrived at the water spout, petitioner crawled up on top in the usual way to take water (R. 13).

When he got around in front of the manhole, which is about 10 or 12 inches high and about 3 feet long (R. 23), there was an area of ice about 6 feet square (R. 55). There was no ice on the rear end where he got on (R. 55); it was from the front side of the manhole to the coal chute (R. 55). The water spout is pulled over the manhole of the tender by means of a long pole with a hook attached thereto. He found the pole embedded in the ice where it had frozen, and he had to kick it out and knock the ice off (R. 55). While petitioner said the ice covered an area 6 feet square (R. 55), some of the respondent's witnesses characterized it as a little or very little ice (R. 72-84). All the ice was behind the fuel space and within the prohibitions of Rule 153 (R. 55, Photographs, R. 76a-d).

After kicking and knocking off the ice petitioner then braced himself with his feet astride, reached over for the water spout and started to pull it into position, when the hook slipped on the water spout and his feet slipped on the ice, causing him to lose his balance and fall to the ground (R. 13-55).

The ice was not deposited on the tender by natural causes (R. 19, 23, 71). There had been neither rain nor snow (id.). It was freezing weather (R. 19-23).

It was admitted on page 17 of respondent's brief in the Appellate Court that the water spattered onto the deck when employes filled the tank (Exhibit A, Brief and Argument of Appellant in Appellate Court of Illinois, page 17). Under the rules and practice, while the tank should be loaded full, the water should not be permitted to overflow (R. 25-26, 71, 78, 82-87). There is a controlling device to gauge the flow and to prevent any overflow (R. 25-26, 86-

87), and water will not spill or slop over unless the employ filling the tank unnecessarily and carelessly permits it to do so (R. 24-25, 71, 78, 82, 86-87).

Petitioner testified that it was easy to keep the water from slopping and he had never seen employes let it do so (R. 25-26). Respondent's evidence was to the same effect: Findley testified that he could regulate the flow so as to get just enough water without overflowing if he handled it right and he usually did (R. 86); Granger testified that the rule is that tanks are to be filled so they don't overflow (R. 71); Holton testified that there is a regulator so that a fellow can gauge the stream just the way he wants it (R. 78); and Smith testified that it is the rule not to let the water go over the top, and that one can prevent it by handling it right (R. 82).

An experienced employe had never seen a manhole cover so defective that the water splashed out (R. 78). It is interesting to note that approximately 4 hours after the accident, the claim agent instructed engineer Granger "to inspect for leaks that might cause ice on the deck" (R. 72). It appears that coal and coal dust will sometimes clog up the water drains on a tender (R. 56). It may be noted that the fireman who finished the job of filling the tank with water after the accident said it was down about 18 or 20 inches (R. 81).

In view of the jury's finding that there was no crack or leak in the tender, it is certain that they also found under the general verdict for petitioner that the water accumulated and froze because of a violation of the rule and customary practice referred to above. These two findings are not at all inconsistent. Accepting the answer to the special interrogatory as final under the decision of the Appellate Court, there is, indeed, no other rational conclusion possible under the evidence.

IV.

SPECIFICATION OF ERRORS.

The Supreme and Appellate Courts of Illinois erred:

1. In holding as a matter of law that there was no violation of the Safety Appliance Act or Boiler Inspection Act.

2. In holding as a matter of law that the evidence was insufficient to warrant a finding that respondent was negligent.

3. In holding that it conclusively appeared as a matter of law that petitioner assumed the risk.

4. In holding that the defense of assumption of risk was available to respondent.

V.

SUMMARY OF ARGUMENT AND AUTHORITIES.

A.

The evidence required or permitted a finding that the Boiler Inspection Act had been violated.

1. If the rule of the Commission were violated the engine was unsafe within the meaning of the Act.

U. S. v. *B. & O. R. Co.*, 293 U. S. 454.
B. & O. R. Co. v. *Groeger*, 266 U. S. 521

2. The statutory liability is absolute and mandatory and not dependent upon negligence.

Brady v. *Terminal R. Assn. of St. L.*, 303 U. S. 10.
Southern R. Co. v. *Lunsford*, 297 U. S. 398.

Baltimore & O. R. Co. v. *Groeger*, 266 U. S. 521.

U. S. v. *B. & O. R. Co.*, 293 U. S. 454.

Lehigh Valley R. Co. v. *Beltz*, 10 F. (2d) 74.

3. The Act should receive a liberal construction.

St. Louis I. M. & S. R. Co. v. *Taylor*, 210 U. S. 281.

Louisville & N. R. Co. v. *Layton*, 243 U. S. 617.

Swinson v. *Chicago, St. P. M. & O. Ry. Co.*, 294 U. S. 529.

Brady v. *Terminal R. Assn. of St. L.*, 303 U. S. 10.

4. It is the duty of the Court to take judicial notice of the rules of the Commission.

Roberts, Federal Liabilities of Carriers, Vol. 2, Sec. 1020.

Caha v. *U. S.*, 152 U. S. 211.

Jenkins v. *Collard*, 145 U. S. 546.

Knight v. *U. S. Land Ass'n.*, 142 U. S. 161.

Thompson v. *Missouri Pac. R. Co.*, 15 F. (2d) 28.

Goulette's Admr. v. *Grand Trunk Ry. Co.*, 93 Vt. 266, 107 A. 118.

5. The Court will apply the Federal Act upon appeal even though not mentioned or urged at the trial.

Grand Trunk Western Ry. v. *Lindsay*, 233 U. S. 42.

Norfolk & W. Ry. Co. v. *Hall*, 49 F. (2d) 692.

Thompson v. *Hocking Valley R. Co.*, 45 F. (2d) 155.

Hines v. *Smith*, 275 F. 766.

Central Vermont Ry. Co. v. *White*, 238 U. S. 507.

Kansas City W. R. Co. v. *McAdow*, 240 U. S. 51.

6. The Act was violated as a matter of law.

45 U. S. C. A. 23; June 7, 1924; c. 355, 45 Stat. 659.

Rule 153(a), (c).—Interstate Commerce Commission—Roberts, Federal Liabilities of Carriers, Vol. 2, appendix 5, pages 2068 and 2069.

7. The question was for the jury.

Anderson v. *B. & O. R. Co.*, 89 F. (2d) 629, Cert. den. 302 U. S. 696.

B.

The evidence warranted a finding respondent was negligent.

1. Care must be commensurate to the risk.

Glynn v. *Krippner*, 60 F. (2d) 406.

Atlantic Refining Co. v. *Smith*, 94 F. (2d) 377.

Grand Trunk R. Co. v. *Richardson*, 91 U. S. 454.

2. The presence of the ice established a prima facie case of negligence.

Castle v. *Union Pac. R. Co.*, 139 Minn. 396; 166 N. W. 767.

Sears Roebuck & Co. v. *Peterson*, 76 F. (2d) 243.

York v. *Chicago, M. & St. P. Ry. Co.*, 184 Wis. 110; 198 N. W. 377.

Bell v. *Terminal R. of St. L.*, 322 Mo. 886; 18 S. W. (2d) 40.

Missouri Pac. R. Co. v. *Boyd*, 194 Ark. 121; 106 S. W. (2d) 165.

Rock Island v. *Matthews*, 185 Ark. 724; 49 S. W. (2d) 392. Cert. den. 287 U. S. 640.

Crabtree v. *Western Pac. R. Co.*, (Cal.) 90 P. (2d) 835.

Jersey City Stockyards v. *Grobner*, 5 F. (2d) 963.

Northern Pac. Ry. Co. v. *Berven*, 73 F. (2d) 687.

Gulf C. & S. F. Ry. Co. v. *Crow*, (Tex.) 220 S. W. 237.

3. The Court should not speculate to find a defense.

Kulp v. *C. St. P. M. & O. Ry. Co.*, 88 F. (2d) 466, Cert. den. 301 U. S. 700.

Terminal R. Ass'n. of St. L. v. *Farris*, 69 F. (2d) 779.

4. Custom is the standard of care.

68 A. L. R. 1400.

Tex. & Pac. R. Co. v. *Behymer*, 189 U. S. 468.

5. If reasonable minds may disagree, the issue is for the jury.

Gunning v. *Cooley*, 281 U. S. 90.

Railroad Co. v. *Stout*, 17 Wallace 657.

C.

The petitioner did not assume the risk as a matter of law.

1. Assumed risk was properly submitted to the jury.

(a) This defense is based on *Volenti non fit injuria*.

Fitzgerald v. *Conn. River Paper Co.*, 155 Mass. 155, 29 N. E. 464.

Mahoney v. *Doré*, 155 Mass. 513, 30 N. E. 366.

C. N. O. & T. P. Ry. Co. v. *Thompson*, 236 F. 1.

Olney v. *Boston & M. Ry. Co.*, 71 N. H. 427; 52 A. 1097.

3 Labatt, Master and Servant, (2d Ed.) Sec. 1304, p. 3660.

Thomas v. *Quartermaine*, 18 Q. B. D. 685, 696.

Yarmouth v. *France*, 19 Q. B. D. 647.

(b) The defense is not a favored one and the burden of proof is on the Master.

Kanawaha & M. R. Co. v. *Kerse*, 239 U. S. 576.

39 C. J., sec. 891, p. 689.

Tex. & Pac. R. Co. v. *Archibald*, 170 U. S. 665.

C. R. I. & P. Ry. Co. v. *Ward*, 252 U. S. 18.

Chesapeake & O. R. Co. v. *Proffit*, 241 U. S. 462.

(c) Great care should be exercised not to sacrifice the servant's rights by confusing contributory negligence with assumption of risk.

Schlemmer v. *Buffalo R. & P. R. Co.*, 205 U. S. 1.

Cross v. *C. B. & Q. R. Co.*, 191 Mo. App. 202, 186 S. W. 1130.

Chicago & E. R. Co. v. *Penn*, 191 F. 682.

Atlas Portland Cement Co. v. *Hagen*, 233 F. 24.

(d) Walking on ice may be contributory negligence and is not assumption of risk.

13 A. L. R. 73.

Great Atlantic & Pac. Tea Co. v. *Chapman*, 72 F. (2d) 113.

Phillips Petroleum Co. v. *Childress*, 78 F. (2d) 861.

Lord Baltimore Filling Stations v. *Miller*, 110 F. (2d) 698.

(e) Where a railroad employe steps on a slippery substance, his conduct is not assumption of risk.

Mason & O. R. Co. v. *Yockey*, 103 F. 265.

Bell v. *Terminal R. of St. L.*, 322 Mo. 886; 18 S. W. (2d) 40

Missouri Pac R. Co. v. *Boyd*, 194 Ark. 121; 106 S. W. (2d) 165.

York v. *Chicago, M. & St. P. Ry. Co.*, 184 Wis. 110; 198 N. W. 377.

Reams v. *Chicago M. St. P. & P. R. Co.*, 180 Minn. 534, 231 N. W. 236.

Melody v. *Des Moines Union Ry. Co.*, 161 Ia. 695; 141 N. W. 438.

New York, N. H. & H. R. Co. v. *Branstreeter*, 200 F. 255.

See also:

Cincinnati N. O. & T. P. Ry. Co. v. *Thompson*, 236 F. 1.

Chicago, R. I. & P. Ry. Co. v. *King*, 165 Okla. 169; 25 P. (2d) 304.

Pitcairn v. *Hunault*, 86 F. (2d) 664.

McCarthy v. *Palmer*, 113 F. 721.

Northern Pac. Ry. Co. v. *Berven*, 73 F. (2d) 687.

Leonidas v. *Great Northern Ry. Co.*, 30 Mont. 446, 76 P. (2d) 1007, Aff. 305 U. S. 1.

(f) Failure to choose the safe course is contributory negligence and not assumption of risk.

Anzolotti v. *McAdoo*, 262 F. 568.

Thomson v. *Boles*, 123 F. (2d) 487.

Terminal R. Ass'n. of St. L. v. *Farris*, 69 F. (2d) 779.

Norfolk & W. R. Co. v. *Riggs*, 98 F. (2d) 612.

Rocco v. *Lehigh Valley R. Co.*, 228 U. S. 275.

(See State citations cited in brief.)

(g) The employe is entitled to time for deliberation, choice and assent.

Olney v. *Boston, & M. Ry. Co.*, 71 N. H., 427, 52 A. 1097.

3 Labatt, Master and Servant (2d Ed.) Sec. 1304, p. 3660.

Southern Pac. R. Co. v. *Yeargin*, 109 F. 436, Cert. den. 183 U. S. 695.

C. N. O. & T. P. Ry. Co. v. *Thompson*, 236 F. 1.

White, Personal Injuries on Railroads, Vol. 1, p. 377.

1 Shearman and Redfield, Negligence, (6th Ed.) Sec. 211.

(h) A railroad employe is not required to abandon the service.

Mason & O. R. Co. v. *Yockey*, 103 F. 265.

Kane v. *Northern Cent. Ry. Co.*, 128 U. S. 91.

D.

The amendment of 1939 was retroactive.

(a) The defense of assumed risk is not a vested right

Arizona Copper Co. v. *Hammer*, 250 U. S. 400.

Campbell v. *Holt*, 115 U. S. 620.

Cooley, Principles of Constitutional Law, 3d Ed., p. 360-1.

(b) The use of the past tense in the word "brought" makes the amendment retroactive.

Hine v. *Belden*, 29 Conn. 384.

Link v. *Receivers of Seaboard Airline Ry. Co.*, 73 F. (2d) 149.

(c) An appellate court must apply any law enacted before decision.

Vandenbark v. *Owens-Ill. Glass Co.*, 311 U. S. 538.

U. S. v. *Schooner Peggy*, 1 Cranch 103.

South Carolina v. *Gaillard*, 101 U. S. 433.

Ewell v. *Daggs*, 108 U. S. 143.

Railroad v. *Grant*, 98 U. S. 398.

Carpenter v. *Wabash R. Co.*, 309 U. S. 23.

Wall v. *Chesapeake & O. Ry. Co.*, 290 Ill. 227; 125 N. E. 20.

(d) Remedial legislation may and should be construed retroactively.

Levy v. *Birnschein*, 206 Wis. 486; 240 N. W. 140.

Lewis Sutherland, Statutory Construction, Vol. 2, p. 1227.

McGuire v. *Cunningham*, 80 Cal. 553; 22 P. 839.

Dehan v. *Hotel & Restaurant Employees, etc.*, (La. App.) 159 So. 637.

DeMarse v. *Bruckman*, 298 N. Y. S., 736.

Bartley v. *Boston, etc. Ry.*, 198 Mass. 163, 83 N. E. 1093.

VI.

ARGUMENT.

Prefatory Statement.

At the threshold of the argument several queries present themselves:

First, is the evidence such as either to require a finding by the Court or to permit a finding by the jury that the Boiler Inspection Act had been violated?

If the above question be answered in the affirmative with respect to either aspect, the decision of the Appellate Court must be reversed and the original judgment in favor of the petitioner must be reinstated without reference to the doctrine of assumed risk and common law negligence, which then becomes wholly immaterial. If the above questions in both aspects be answered in the negative, then the third query is:

Third, was the evidence sufficient to sustain a finding by the jury that respondent was negligent?

If so, the fourth question arises:

Fourth, did petitioner assume the risk as a matter of law?

It may be noted that where only a motion *non obstante verdicto* is filed, as in this case, the petitioner is entitled to have the evidence and the inferences to be drawn therefrom viewed in their aspects most favorable to his case. *Russell* v. *Richardson*, 302 Ill. App. 589, 24 N. E. (2d) 185; *Goodrich* v. *Sprague*, 376 Ill. 80, 32 N. E. (2d) 897.

A.

The evidence required or permitted a finding that the Boiler Inspection Act had been violated.

The trial Court instructed the jury that the action was brought under both the Federal Employers' Liability Act

and the Safety Appliance Act, reading verbatim the so-called Boiler Inspection Act in its charge (R. ~~175-6~~). The jury was further instructed "that under the law the defendant was bound to furnish the plaintiff a locomotive, at the time in question, which was safe to be used, and to keep and maintain the same in such condition at all times so as not to expose the plaintiff to any hazard or risk" (R. ~~178~~). Nowhere was the jury limited in considering the Safety Appliance Act or the Boiler Inspection Act to that feature thereof involved in the special interrogatory nor was any such limitation requested by the respondent.

Under the Court's charge the jury had a perfect right to adopt petitioner's theory that the Safety Appliance Act had been violated in the respect not involved in the special interrogatory, and from the general verdict it is apparent that the jury may have properly so found. We propose to demonstrate that this finding should be sustained under the applicable law.

Congress in 1893 first inaugurated the policy of protecting railroad employes by a series of statutes with reference to brakes, couplers, grab irons, hand holds, drawbars, sill steps, etc., commonly referred to as the Safety Appliance Acts. On February 17, 1911, c. 3, 36 Stat. 2, Congress extended the Safety Appliance Acts to "the boiler of said locomotive and appurtenances thereto." This extension is commonly known as the Boiler Inspection Act. On March 4, 1915, c. 169, 38 Stat. 1192, Congress extended the Boiler Inspection Act to include the entire locomotive and tender and all parts and appurtenances thereof. On June 7, 1924, c. 355, 43 Stat. 659, its phraseology was again amended. It provided (45 U. S. C. A. 23; June 7, 1924, c. 355, 43 Stat. 659):

> "Use of unsafe locomotives and appurtenances unlawful; inspection and tests. It shall be unlawful for any carrier to use or permit to be used on its line any

locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, have been inspected from time to time in accordance with the provisions of Sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Under the authority conferred the Interstate Commerce Commission issued Rule 153 which provides (Official Pamphlet of Interstate Commerce Commission, Bureau of Locomotive Inspection, Orders dated October 11, 1915, to February 21, 1929, inclusive; see also Roberts, Federal Liabilities of Carriers, Vol. 2, appendix 5, pages 2068 and 2069):

"TENDERS.

"Rule 153.(a) Tanks shall be maintained free from leaks, and in safe and suitable condition for service.

* * *

"(c) Top of tender behind fuel space shall be kept clean, and means provided to carry off waste water.

* * * *"

It seems hardly necessary to add that the purpose of the original Act as supplemented by Rule 153 is to insure the removal of any foreign or extraneous material that might endanger the safety of employes. The words safe, proper and suitable are of plain and simple meaning. Rule 153 specifically provides for the removal of waste water. The word "clean" obviously has connotations of safety rather

than of purity. It was no doubt promulgated because of the general knowledge that in cold weather if means are not provided to carry off the waste water and it is permitted to remain on the tender and freeze, it will subject the employe to the very danger which brought about the tragic accident to petitioner.

This rule was in effect at the time of the accident, became an integral part of the Act itself and was controlling upon the lower Courts, because, as said by Justice Brandeis in *U. S.* v. *B. & O. R. Co.*, 293 U. S. 454:

> "When the rules have not been complied with which were issued by the Commission the engine is unsafe within the meaning of the Boiler Inspection Act."

The rule is well stated in *B. & O. R. Co.* v. *Groeger*, 266 U. S. 521:

> "The duty of the Commission is not merely to inspect. It is also to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not 'in proper condition' for operation. Thus the Commission sets the standard."

The issue as to whether ice thereon constituted a violation of the Act was raised by the pleadings and submitted to the jury (R. 4, 116, 117-118). In sustaining the verdict under the Act, despite the answer to the special interrogatory, the trial Court stated:

> "Now, whether there was a crack or not, yet still the question of the safety appliance could remain in there if the court did feel that it was the duty of the defendant to keep the tender clear so that the man might operate. I don't know about that. It might be" (R. 115).

Where there is a violation of the Act, neither contributory negligence (45 U. S. C. A. 53) nor assumption of risk, (45 U. S. C. A. 54) constitutes a defense, either total or partial. Both defenses are completely eliminated from consideration. Furthermore, this Court has held that the duty of the carrier under the Act is absolute and mandatory and makes the railroad company an insurer. As said by Mr. Justice Hughes in *Brady* v. *Terminal R. Assn. of St. L.*, 303 U. S. 10:

> "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care, however assiduous."

See also to the same effect *Southern R. Co.* v. *Lunsford*, 297 U. S. 398; *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521; *U. S.* v. *Baltimore & O. R. Co.*, 293 U. S. 454; *Lehigh Valley R. Co.* v. *Beltz*, 10 F. (2d) 74, cert. den. 270 U. S. 641.

In the consideration of doubtful questions this Court has disapproved of a strict or narrow or technical construction of the Safety Appliances Acts, adopting a liberal policy to effectuate their humanitarian purpose. *St. Louis I. M. & S. R. Co.* v. *Taylor*, 210 U. S. 281; *Louisville & N. R. Co.* v. *Layton*, 243 U. S. 617; *Swinson* v. *Chicago, St. P. M. & O. Ry. Co.*, 294 U. S. 529; *Brady* v. *Terminal R. Co.*, 303 U. S. 10. As said in the *Taylor* case, *supra*:

> "Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, so far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon

those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard."

The only argument advanced by respondent to meet these contentions is that Rule 153 was overlooked by petitioner's counsel and the members of the Appellate Court until the petition for rehearing was filed, with the further suggestion that reliance upon it now involves a "change of theory." It is a complete reply to assert that if this rule is a part of the Act itself, as held in *U. S.* v. *B. & O. R. Co.*, 293 U. S. 454, then the Court must take judicial notice of the rules as well as the Act itself. Roberts, in Federal Liabilities of Carriers, Vol 2, Sec. 1020, states:

> "*Judicial notice of orders of Interstate Commerce Commission.* * * * Thus the courts will take judicial notice of the orders of the Interstate Commerce Commission pursuant to the authority delegated to it in the Safety Appliance Act and other federal safety statutes."

The author in support of the text cites *Caha* v. *U. S.*, 152 U. S. 211; *Jenkins* v. *Collard*, 145 U. S. 546; *Knight* v. *U. S. Land Assn.*, 142 U. S. 161. In *Thompson* v. *Missouri Pacific R. Co.*, 15 F. (2d) 28, the Court took judicial notice of the Safety Appliance Act and that under orders of the Interstate Commerce Commission ladders on freight cars have been standardized. In *Goulette's Admr.* v. *Grand Trunk Ry. Co.*; 93 Vt. 266, 107 A. 118, it was said:

> "In actions under the Federal Employers' Liability Act the Courts will take judicial notice of standards established by orders of the Interstate Commerce Commission pursuant to authority granted by the Safety Appliance Act."

This case has been tried and presented by petitioner throughout on the theory that the Act was violated in not

merely the one respect foreclosed by the answer to the special interrogatory, but by the mere presence of the ice itself. The trial Court apparently had the same idea (R. 115). In petitioner's brief in the Appellate Court on page 9 thereof he claimed that he had made out a clear violation of the Act and referred to his complaint as making "two charges of a violation of this Act," one of them being the allegation that the tender was slippery and covered with ice. (Exhibit B, Brief and Argument for Appellee filed in Appellate Court, page 9). Therefore, the fact that Rule 153 was not urged upon the Appellate Court of Illinois until the petition for rehearing is of no significance. It was therein fully discussed (R. 140 to 148) and was likewise called to the attention of the Supreme Court of Illinois in the petition for leave to appeal (R. 150 to 162). This Court has held that where the facts alleged and the proof adduced clearly established that the injury complained of was governed by the Federal Act, then this statute controls even though not urged at the trial. *Grand Trunk Western Ry.* v. *Lindsay*, 233 U. S. 42. In that case the Federal Act was regarded as controlling and it was held not error for the reviewing Court to test the correctness of the rulings of the trial Court by the Employers' Liability Act, even though it had not been urged or considered below.

That it is not necessary to refer either to the Safety Appliance Act or the Employers' Liability Act, or that even though the pleader mistakenly alleges a case under the State Act, this is immaterial and the Court is presumed to be cognizant of the Federal statutes and to apply them, was held in *Norfolk & W. Ry. Co.* v. *Hall*, 49 F. (2d) 692, and *Hines* v. *Smith*, 275 F. 766. See also *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507 and *Kansas City W. R. Co.* v. *McAdow*, 240 U. S. 51. As said in *A. T. & S. F. Ry. Co.* v. *Scarlett*, 300 U. S. 471, "The regulation having been made by the Commission in pursuance of constitutional

statutory authority, it has the same force as if prescribed in terms by the statute."

The application of a controlling rule of law overlooked by an inferior Court does not involve a change of theory. The situation is identical to that existing where both counsel and the lower Court merely overlook a controlling authority, for example, a decision by this Court. There is no change to a different or inconsistent theory of a cause of action or a defense. In the case at bar petitioner's counsel and the Appellate Court had simply overlooked an applicable rule of law which confirmed, fortified and required that the result reached by the jury and the trial Court be sustained, and in seeking here a decision in accord with the controlling principles of law, we are not changing the theory of the case at all.

The elementary rules relied upon by respondent that one who has invited error and induced the Court to commit it cannot later complain, that a party cannot submit his case on one theory and ask for a reversal upon *another and inconsistent theory*, and that parties are bound by the determination of issues not made by the pleadings but litigated by consent, have not the remotest application to the instant situation, which falls within an altogether different category. Respondent seeks to bind petitioner by the mere statement of his counsel in the closing argument that a negative answer to the special interrogatory would put his client out of court. This was a mere expression of opinion, clearly erroneous under the law. It binds neither court nor client. It is absurd to suppose that a lawyer could thus change the governing and applicable rules of law. The statement was made in a context which indicates that it could not and should not be accepted with the literal interpretation placed upon it by respondent (R. 113).

Even had counsel failed to urge the liability of the railroad company under the Act, yet if the proof shows a vio-

lation, it is the duty of the Court to take cognizance of it and to enforce the law as held in *Thompson* v. *Hocking Valley R. Co.*, (6 Cir.) 45 F. (2d) 155. The Court there said that if the appliance was really unsafe and the plaintiff was entitled to recover under the Act, "The shortcomings of counsel ought not to be given fatal effect."

The authorities relied upon by respondent as holding that the mere presence of ice upon the tender does not establish a violation of the Act are distinguishable in that none of them involved a claim of liability based upon non-compliance with the standard set up by a rule of the Interstate Commerce Commission. Typical is *Ford* v. *New York, N. H. & H. R. Co.*, 54 F. (2d) 342, cert. den. 285 U. S. 549, holding that grease upon a handhold did not constitute a violation of the Safety Appliance Act. In that case the rule of the Interstate Commerce Commission prescribed only the size, dimensions and mechanical construction of the handhold. It did not require that it should be kept clean or free from grease. Here the rule requires that the tender be kept clean and free from waste water. Therefore, the very element which was absent in the *Ford* case is present in the case at bar, and, furthermore, in the *Ford* case the grease was not attributed to a negligent origin but reliance was placed solely upon the Boiler Inspection Act.

The *Ford* case was distinguished in *Anderson* v. *B. & O. R. Co.*, (2 Cir.) 89 F. (2d) 629, Cert. den. 302 U. S. 696, involving Rule 120 of the Commission requiring locomotives to be "equipped with proper sanding apparatus, which shall be maintained in safe and suitable condition for service and tested before each trip." In wet and rainy weather the sanding pipes became clogged, and yet the Court held, "On the issue of violation of the Boiler Inspection Act and Rule 120 there was evidence enough to go to the jury."

B.

The evidence warrants a finding respondent was negligent.

The Courts below held that the evidence of negligence was insufficient because, first, the origin of the water and ice did not appear, and, secondly, respondent had no notice of its existence. We shall discuss these questions in the order indicated.

Neither the water previously nor the ice into which it was converted was created by natural causes. There had been neither rain nor snow. It was freezing weather (R. 19, 23, 71).

In truth and in fact, the origin of the water and the ice did appear and it was established that it had accumulated because the employe or employes who previously filled the tank had negligently, in contravention of the rules and practices, permitted an overflow (R. 19-20, 24-25, 70-71, 78, 82, 86-87). The origin of the ice was no mystery to the respondent when it prepared its brief in the Appellate Court, because on page 17 it was there stated, "If there was any ice on the deck of the tender, it resulted from water unavoidably spattering onto the deck of the tender from the force of the water as the water is put in the tender by the crew" (Exhibit A, Brief and Argument for Appellant filed in Appellate Court, page 17).

It is settled that the degree of care required must be commensurate with the risk; it depends on both the likelihood of injury and the gravity thereof. It depends upon the circumstances of each particular case, the greater care being required for the greater danger. The controlling test is, what should a reasonably prudent person have

done in view of the danger and the risk. The care must be in proportion to the danger..

Chicago, M. & St. P. R. Co. v. *Moore* (8 Cir.), 166 F. 663.

Glynn v. *Krippner* (8 Cir.), 60 F. (2d) 406.

Grand Trunk R. Co. v. *Richardson*, 91 U. S. 454.

In re Spencer Kellogg & Sons, 52 F. (2d) 129.

Ensign-Bickford Company v. *Reeves*, 95 F. (2d) 190.

Leach v. *St. L. S. F. Ry. Co.*, 48 F. (2d) 722.

Atlantic Refining Co. v. *Smith*, 94 F. (2d) 377, Cert. den. 303 U. S. 658.

The fact that the Interstate Commerce Commission has prohibited the accumulation of waste water by a specific rule, and the fact that this rule to the knowledge of the company had been in effect for many years, is itself indicative that reasonable foresight should have anticipated and guarded against the presence of such water and the resulting ice. One can hardly conceive of conduct better calculated to break someone's neck than to permit water to flood an area six feet square upon the deck of a tender in actual service in freezing weather. Even without Rule 153, the dictates of ordinary prudence should require that any such danger be eliminated insofar as possible.

If as held in *Castle* v. *Union Pac. R. Co.*, 139 Minn. 396, 166 N. W. 767, the presence of particles of coal ranging from dust to the size of a walnut and located on the footboard of a switch engine is sufficient evidence that the hostler had negligently permitted them to spill over and remain there, despite his sworn testimony that he had brushed them off and removed all the particles, then it is difficult to understand why the presence of the ice on the tender together with the evidence showing that water would not get there unless the employes had unnecessarily

and contrary to the rule and practice permitted it to overflow, should not be sufficient to sustain a finding of negligence in the case at bar.

The general principle applicable here was well expressed in *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, as follows:

> "The duty of the master to use reasonable diligence to provide a safe place for employes to work, to carry on the occupation in which they are employed is too well settled to require much consideration now. This duty is a continuing one and discharged only when the master provides and maintains a place of that character."

As established by the record and as indicated in respondent's brief in the Appellate Court, the origin of the water is directly traceable to the conduct of respondent's employees. There is no other way the ice could have formed unless we are to suppose that some trespasser, unobserved by the crew, stole his way to the top of the tender and thence to the area between the manhole cover and the fuel space and spread a pail of water over a six foot area at some unknown time between the departure from the roundhouse at Detroit and the arrival in the yards or during the switching operations at Ferndale. As held in *Kulp* v. *C. St. P. M. & O. Ry. Co.*, 88 F. (2d) 466, Cert. den. 301 U. S. 700, such speculation to find a defense is not permissible:

> "In the absence of direct testimony, the simple suggestion of theories by the defense does not reduce the jury to mere speculation, and disqualify it from determining the cause of the injury complained of."

More precisely in point is *Terminal R. Ass'n of St. L.* v. *Farris*, 69 F. (2d) 779, 785, where the origin of the sand

which interfered with an interlocking system was traceable to the defendant only by inference, but it was said:

> "The fact that hypotheses incompatible with the liability of appellant may be conjectured or imagined, when such are not based on any testimony in the case, affords no reason to reverse a verdict and judgment which is supported by the testimony."

It is thoroughly established that a departure from the usual custom and practice is evidence of negligence for the consideration of a jury. See *Custom as Standard of Care*, 68 A. L. R. 1400. As said by Mr. Justice Holmes in *Texas & Pac. R. Co. v. Behymer*, 189 U. S. 468, where a brakeman was thrown from the icy top of a car by a sudden and negligent stop:

> "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

The notion that respondent did not have notice of the presence of the ice and, therefore, was not guilty of negligence is equally a perversion of legal principles. An owner of premises is not entitled to receive actual knowledge of the acts of his employes as a foundation for liability in tort. As said in *Sears, Roebuck & Co.* v. *Peterson*, 76 F. (2d) 243:

> "But it is urged by defendant that there was no proof that defendant had knowledge of the presence of the twine upon the floor, or that it had been upon the floor for such a length of time as to charge it with constructive knowledge. This is not a case in which the condition was attributable either to the elements or the act of some third party. The negligence here complained of was that of the defendant itself, com-

mitted, it is true, by its employes. It would be an anomaly to hold that one is not to be charged with notice of a condition arising from his own active negligent act, or that there must be proof of knowledge or notice of a dangerous condition created by the negligent act or omission of the owner of the premises. It is universally held that the owner of the premises is charged with notice of any structural defects in his property, on the theory that one must be charged with notice of his own act, and, hence, *whenever defective conditions are due to the direct act of the defendant, or of persons whose acts are constructively his own, no notice need be shown, but is necessarily implied.*" (Italics ours.)

In the *Peterson* case, *supra*, where a piece of cord was lying in the aisle of a store but it did not appear how long it had been there, but it did appear by inference that some employe had probably left it there, the Circuit Court of Appeals said that under such circumstances, "Neither should the court indulge in mere speculation as to a possible defense unsupported by any proven facts."

It is respectfully submitted that the case at bar comes within the doctrine stated by Mr. Justice Butler in *Gunning* v. *Cooley*, 281 U. S. 90, that:

> "Where uncertainty as to the existence of negligence arises from a conflict in the testimony, or because, the facts being undisputed, fair minded men would honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

As said in *Railroad Co.* v. *Stout*, 17 Wallace 657, 663, concerning the inference of negligence which might be drawn from proven facts, "It is this class of cases

and those akin to it that the law commits to a decision of a jury."

Every element necessary to meet the definition of negligence adopted by the Restatement of the Law of Torts, Sections 289, 290 and 302(b), is present in the case at bar. Many of the authorities cited on assumption of risk and contributory negligence in the following subdivision of this brief are not only of helpful relevance, but are so closely in point as to be determinative of this issue, especially such cases as *York* v. *Chicago, M. & St. P. Ry. Co.*, 184 Wis. 110, 198 N. W. 377; *Melody* v. *Des Moines Union Ry. Co.*, 161 Ia. 695, 141 N. W. 438, on rehearing 145 N. W. 466; *Missouri Pac. R. Co.* v. *Boyd*, 194 Ark. 121, 106 S. W. (2d) 165; *Reams* v. *C. M. & St. P. R. Co.*, 180 Minn. 534, 231 N. W. 236; *Bell* v. *Terminal R. of St. L.*, 322 Mo. 886, 18 S. W. (2d) 40.

Specific reference will be made only to the *York* case, *supra*, where a brakeman slipped on the icy platform of a car, and in sustaining a recovery, the court said:

> "Where the condition, however, is not the result of natural causes, but is due to the acts of the defendant or its employes, a different situation arises. The conditions, however, may be the result of a combination of natural and artificial causes, and it appears that when such a combination exists and where the artificial cause is created by the acts of the defendant or its employes, a proper issue on the subject of negligence is raised."

The cases relied upon by respondent on this branch of the case, principally *Missouri Pac. R. Co.* v. *Aeby*, 275 U. S. 426 and *Hatton* v. *N. Y., N. H. & H. R. Co.*, 261 F. 667 (the latter being cited by the Appellate Court) involved ice resulting from natural causes and not from the act of the master's employes and, therefore, the courts properly held

that either actual or constructive notice was a necessary element of negligence. In the *Aeby* case the depression where the rain accumulated had existed for months with the knowledge of the plaintiff; the station agent, who was the only employe under a duty to inspect, report and to remedy the condition.

The mere existence of a strip of iron extending upwards upon a platform (*Northern Pac. Ry. Co.* v. *Berven*, 73 F. (2d) 687) or of oil thrown upon a stairway by adjoining machinery (*Jersey City Stockyards* v. *Grobner*, 5 F. (2d) 963) or of oil upon the deck of the tank and tender of an engine (*Rock Island* v. *Matthews*, 185 Ark. 724, 49 S. W. (2d) 392, Cert. den. 287 U. S. 640), or of oil and grease on the tank of a locomotive where it was not usual and customary for it to be there (*Gulf C. & S. F. Ry. Co.* v. *Crow*, (Tex.) 220 S. W. 237) or of grease on the running board of locomotive (*Crabtree* v. *Western Pac. R. Co.*, 33 Cal. App. (2d) 35, 90 Pac. (2d) 835) or of ice upon the apron between the tender and the cab of the locomotive (*Missouri Pac. R. Co.* v. *Boyd*, 194 Ark. 121, 106 S. W. (2d) 165), is sufficient to permit an inference of negligence where the circumstances render it probable that it resulted from the conduct of an employe. As said in *Missouri Pac. R. Co.* v. *Boyd*, *supra*:

> "If, as the jury has found, there was ice on the steps and apron, how did it get there, if not by the act of the brakeman in wetting down the coal?"

If, as the jury found, there was no crack or leak in the case at bar, then how did the ice, which the jury found was present on the tender, get there if not by the act of the hostler in negligently permitting an overflow when he filled the tank?

In *Crabtree* v. *Western Pac. R. Co.*, 33 Cal. App. (2d) 35, 90 P. (2d) 835, where plaintiff slipped on some grease, it

was said, "In the present action the plaintiff established a prima facie case of negligence on the part of some co-employe in leaving a lump of grease on the running board. It was not necessary for him to prove just who dropped that grease upon the board." The Court said that in view of the duty to wipe off grease and leave the running board clean, identical with the duty here under Rule 153 and under the usual practice to keep water off the tank, its presence made a prima facie case of negligence.

C.

The petitioner did not assume the risk as a matter of law.

1. The issues of contributory negligence and assumption of risk were properly submitted to the jury.

Historically the doctrine of assumed risk arose before the industrial revolution and at a time when the servant and the master worked side by side at a common bench. Business operations were of a simple nature. The servant performed but simple tasks with simple tools and his fellow servants, few in number, were close and well known to him and the master. Out of this situation arose the defense based on *Volenti non fit injuria.* As said by Bowen, L. J., in *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, 696:

> "The maxim, be it observed, is not *'scienti' non fit injuria,* but *'volenti.'* It is plain that mere knowledge may not be a conclusive defense."

Later in *Yarmouth* v. *France*, 19 Q. B. D. 647, the *Thomas* decision was carefully analyzed and it was said:

> "Taking the whole of that judgment together, it seems to me to amount to this: that mere knowledge

of the danger will not do; there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim *Volenti non fit injuria*. If so, that is a question of fact."

The seal of condemnation was placed upon the entire doctrine and its last vestiges were abolished in England by an Act of Parliament passed August 6th, 1897 (vide St. 60 and 61, Vict. c. 37, Chitty's English Statutes, Supplement 1895-1901, vol. 14). Why this anachronism has persisted in the jurisprudence of this country when it is so wholly unsuited to our complex and hierarchical organization of business is a mystery. It has never been a favored doctrine in this Court, which has regarded it as artificial and harsh and as an affirmative defense the burden to establish which is upon the master.

Kanawaha & M. R. Co. v. *Kerse*, 239 U. S. 576.
Tex. & Pac. R. Co. v. *Archibald*, 170 U. S. 665.
C. R. I. & P. Ry. Co. v. *Ward*, 252 U. S. 18.
Chesapeake & O. R. Co. v. *Proffit*, 241 U. S. 462.
39 C. J., sec. 891, p. 689.

There are two kinds of risks: 1, ordinary risks, and, 2, extraordinary risks arising from negligence. Those in the latter classification are usually not assumed, and the courts are reluctant to sustain this defense when risks in the second category due to negligence are involved. Has respondent met the burden so conclusively that reasonable minds cannot disagree? Petitioner did not know that the ice was there until he got around in front of the manhole nor until "after I got into the ice" (R. 55). He picked up the pole and knocked off the ice and braced himself "good" and got hold of the spout and pulled it part way around, without slipping (R. 13, 55).

Here it was not solely the fact that petitioner slipped upon the ice that caused the accident; there was also the element that the pole and hook slipped on the water spout; both were causative factors (R. 13, 55). There is no evidence that the hook was certain to slip or even likely to slip. There was no evidence that petitioner knew that the hook would slip. There was no evidence that he did not justifiably believe that the hook would remain upon the water spout and that with his feet astride and properly braced, he could succeed safely in filling the tender with water (R. 13, 55). The burden to adduce evidence to show full appreciation and voluntary assent was upon respondent, not petitioner. In the absence of evidence, inferences should be drawn in favor of petitioner, not respondent, and the court should not resort to speculation.

As said in *Chicago & E. R. Co.* v. *Ponn*, 191 F. 682, 687, "The subjects of assumption of risk and contributory negligence are much confused in many of the decisions. They are entirely distinct. One has to do with contract, and the other rests in tort." See also *Atlas Portland Cement Co.* v. *Hagen*, 233 F. 24.

Of particular interest here is *Schlemmer* v. *Buffalo R. & P. R. Co.*, 205 U. S. 1, where Justice Holmes warned that where one is a complete defense and the other is not, the distinction between contributory negligence and assumption of risk should be carefully observed. He called attention to the fact that men who work with their hands do not have the freedom and equality of position assumed by laissez faire, that the doctrine of contract was rather shadowy as applied to this defense, and that distinguishing it from contributory negligence

> "* * * the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous

employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

Following this admonition it was said in *Cross* v. *C. B. & Q. R. Co.*, 191 Mo. App. 202, 186 S. W. 1130, that great care should be exercised "lest the plaintiff's rights be sacrificed entirely by calling his act assumption of risk, when, strictly speaking, it is only contributory negligence, which does not defeat his cause of action entirely but merely reduces his damages."

Judge Dennison, concurring in *Cincinnati N. O. & T. P. Ry. Co.* v. *Thompson*, (6 Cir.) 236 F. 1, 16, interpreted the *Schlemmer* case to mean "That when Congress by this statute greatly broadened plaintiff's right to recover, preserving only one bar out of the three existing, the defendant must bring its case clearly within the bar so preserved; and that plaintiff's conduct should not be treated as assumption of risk, and so be allowed to defeat the action unless it can be clearly and distinctly so classified."

Where a pedestrian knowingly walks upon an icy sidewalk, or where an invitee walks upon icy or slippery premises, his conduct is universally denominated contributory negligence in its legal significance. It is not assumption of risk. The authorities are collated and discussed in 13 A. L. R. 73, "Contributory Negligence in Falling on Slippery Walk." This is also the rule of the Federal

Courts, *Great Atlantic & Pac. Tea Co.* v. *Chapman*, (6 Cir.) 72 F. (2d) 113; *Phillips Petroleum Co.* v. *Childress*, (10 Cir.) 78 F. (2d) 861; *Lord Baltimore Filling Stations* v. *Miller*, (Ct. of App., D. C.) 110 F. (2d) 698.

A juridical standard should not be a respecter of persons. Judicial action must indeed be blind if it holds the conduct of Norvel H. Lilly in walking or standing on ice to be an assumption of risk while he is on duty for respondent as an employe, but classifies essentially the same conduct as contributory negligence simply because there is a slight difference in chronology and geography.

Authorities Directly in Point or Closely Analogous.

In *Fitzgerald* v. *Conn. River Paper Co.*, 155 Mass. 155, 29 N. E. 464, and *Mahoney* v. *Dore*, 155 Mass. 513, 30 N. E. 366, a servant knowingly walked down icy steps while holding to a railing with one hand, and it was held that assumption of risk was a question of fact for the jury. In the latter case it was said that even though a servant knows and appreciates the risk, it was a question of fact, "whether she assumed it voluntarily, or because she felt obliged to continue in the service, and make the best of the situation in which she found herself." It was held that if the employe acts under a call of duty or an exigency or constraint of any kind, the act is deprived of its voluntary character.

In *Mason & O. R. Co.* v. *Yockey*, (6 Cir.) 103 F. 265, where water was escaping and being thrown from the tender because of an imperfectly fitting plug, and the water fell and created an icy covering on the apron between the engine and tender, the Court held it was for the jury to say whether he assumed the risk because the firemen continued to work after he became aware of the escaping water and because he fell on the ice. It was said,

"We do not think there was anything in the circumstances which required the defendant in error to suddenly abandon the service of the company. At least, this duty was not so self-evident as to require the question to be taken from the jury."

Where in order to determine whether the hazard is great and immediate the employe must form opinions and draw conclusions, the question is for the jury. So where the brakeman who was injured when in alighting he stepped on a large piece of slag knew that there were smaller pieces along the roadbed but did not know that there were large ones, a recovery was sustained in *Cincinnati, N. O. & T. P. Ry. Co.* v. *Thompson*, (6 Cir.) 236 F. 1.

To the same effect is *Erie R. Co.* v. *Regan*, (2 Cir.) 297 F. 435, involving snow, and *New York, N. H. & H. R. Co.* v. *Branstretter*, (2 Cir.) 200 F. 255, involving an icy running board.

In *Chicago, R. I. & P. Ry. Co.* v. *King*, 165 Okla. 169, 25 P. (2d) 304, where the deceased stepped on a roughened and uneven ledge of steel upon the tender and fell to the ground, there is a lengthy discussion of the distinction between assumption of risk and contributory negligence. In holding assumed risk was for the jury it was said, "The deceased was not required to keep his mind constantly on the ragged piece of steel even though he may have known of same, in the performance of his duties."

It was held that assumption of risk was for the jury in the following cases: In *Bell* v. *Terminal R. of St. L.*, 322 Mo. 886, 18 S. W. (2d) 40, where a fireman slipped when he knowingly used the icy steps of his engine in alighting; in *Missouri Pac. R. Co.* v. *Boyd*, 194 Ark. 121, 106 S. W. (2d) 165, where a fireman slipped on ice on the apron between the cab and the tender; in *York* v. *Chicago, M. & St. P. Ry. Co.*, 184 Wis. 110, 198 N. W. 377, where a

brakeman slipped from the icy platform of a car but had no knowledge of its condition before boarding it and was engrossed in his duties thereafter; in *Reams* v. *Chicago M. St. P. & P. R. Co.*, 180 Minn. 534, 231 N. W. 236, where a conductor slipped on an icy platform while alighting from the caboose; in *Hardin* v. *Ry. Transfer Co.*, 80 Minn. 504, 83 N. W. 395, where a switch foreman was using some icy steps and even admitted on cross-examination that he had as good an opportunity as anybody to know whether there was ice on them; in *Melody* v. *Des Moines Union Ry. Co.*, 161 Ia. 695, 141 N. W. 438, where a brakeman slipped on a ridge of snow and ice alongside the tracks with one foot while his other foot slipped on ice on a footboard as he was getting on his engine; in *Pitcairn* v. *Hunault*, (7 Cir.) 86 F. (2d) 664, where an employe tripped on a coil spring between the tracks; in *Northern Pac. Ry. Co.* v. *Berven*, (9 Cir.) 73 F. (2d) 687, where a piece of iron had curled up on a platform and was in plain sight and an employe tripped on it; in *McCarthy* v. *Palmer*, (2 Cir.) 113 F. (2d) 721, where a brakeman tripped over a burlap bag on a caboose platform which rendered it defective and the employe knew it was there; and in *Gulf, C. & S. F. Ry. Co.* v. *Crow*, (Tex.) 220 S. W. 237, where a fireman slipped on oil and grease and fell from the tank of a locomotive and the evidence showed it was not usual and customary to find it there.

It is impossible to reconcile the decision below with that of this Court in *Keys* v. *Pennsylvania R. Co.*, 308 U. S. 529, reversing the case of *Keys* v. *Pennsylvania R. Co.*, 104 F. (2d) 663, and holding that assumption of risk was for the jury. We earnestly request the members of this Court to read the opinion which was set aside and disapproved by the reversal in the *Keys* case. It would be a strange system of jurisprudence which would award a jury trial in that case and deny one here.

In *Leonidas* v. *Great Northern Ry. Co.*, 30 Mont. 446, 76 P. (2d) 1007, where an employe was carrying a tie over rough ground and up an embankment, and he stepped on a rock and turned his ankle, falling and injuring his back, this Court held that assumption of risk was for the jury without discussion. *Great Northern Ry. Co.* v. *Leonidas*, 305 U. S. 1.

Analysis and Critique of the Opinion Below.

Upon the trial the respondent called about twelve or more witnesses, all of whom were men of long railroad experience. None of them testified to any facts indicating any impropriety in petitioner's conduct; none of them testified to any custom or practice which he violated or departed from. Respondent itself made no such contention in the court below. Without any evidence to that effect, the lower court gratuitously assumed that in order to relieve himself from the charge of assumed risk the petitioner could and should have made the tender safe with sand or ashes (R. 137). Apparently the members did not know that sand is kept in the dome on top of the engine and practically inaccessible. Apparently the court did not know that all of the sanders operate simultaneously and that while petitioner was down on his knees holding a shovel under one sander, sand would be flowing from the other onto the rails (piled up sand can even cause a derailment); and no doubt the Court was unfamiliar with the fact that this sand is specially prepared and specially dried and is of a character so that engineers are reluctant to permit its use for other purposes. Apparently the Court did not know that whether ashes are available depends upon the condition of the fire and that it is a difficult task to obtain ashes with the fireman's shovel. In fact, after borrowing the shovel, petitioner would have to go through a dangerous proceeding to carry ashes mixed with hot coals

to the top of the tender by either climbing up the ladder or climbing over the coal, and the operation would require the cooperation of two or more crew members.

Apparently the Appellate Court required Lilly to perform the duty of the Master to make the tender safe.

It is obvious that the members of the Appellate Court themselves were utterly unfamiliar with either procedure which they recommended, and had any of them ever attempted to obtain sand from the dome or ashes from the firebox of a locomotive, the juridical result below might have been different. Apparently the members of the Appellate Court were also unfamiliar with the thoroughly established and universally acknowledged rule of law that the failure of the petitioner to select the safer of two courses would be contributory negligence and not assumption of risk.

FEDERAL CASES.

Anzolotti v. *McAdoo*, 262 F. 568.

Thomson v. *Boles*, (8 Cir.) 123 F. (2d) 487.

Terminal R. Ass'n. of St. L. v. *Farris*, (8 Cir.) 69 F. (2d) 779.

Norfolk & W. R. Co. v. *Riggs*, (6 Cir.) 98 F. (2d) 612.

Rocco v. *Lehigh Valley R. Co.*, 228 U. S. 275.

STATE CASES.

Louisville v. *Morrill*, 211 Ala. 39, 99 So. 297, Cert. den. 265 U. S. 582.

Virginia & Portland Cement Co. v. *Swisher's Admr.*, 122 Va. 123; 94 S. E. 159.

St. Louis, I. N. S. R. Co. v. *Yates*, 257 Mo. 593; 166 S. W. 282.

Houlihan v. *Conn. River Co.*, 164 Mass. 555; 42 N. E. 108.

Sinclair Oil & Gas Co. v. *Langley*, 146 Okla. 160; 293 S. W. 1014.

Headrick v. *H. D. Williams Cooperage Co.*, 97 Ark. 553; 134 S. W. 957.

Chicago, R. I. & P. Ry. Co. v. *King*, 165 Okla. 169; 25 P. (2d) 304.

In *Anzolotti* v. *McAdoo*, *supra*, Judge Learned Hand noted the necessity for careful discrimination between the two defenses under the *Schlemmer* decision and said:

> "At any rate, without attempting any exhaustive definition, it appears to me quite safe to say that when the injury arises from a failure to choose correctly between two ways of discharging those duties, one of which is safe and the other hazardous, the servant has not assumed the risk, but has negligently contributed to the injury."

In *Thomson* v. *Boles*, *supra*, where the authorities are cited, the Circuit Court of Appeals of the Eighth Circuit said:

> "Moreover, the departure, if any, from the usual and customary practice would not be a complete defense, but would merely constitute contributory negligence."

In *Louisville* v. *Morrill*, *supra*, the Alabama court said:

> "If there are two ways in which an act can be done—one a safe way, the other a dangerous way—and the person who has to do the act chooses the dangerous way with knowledge of the danger, he is guilty of contributory negligence and not assumption of risk."

All of the authorities cited by respondent or relied upon by the Appellate Court are distinguishable in that they fall within one of three classes:

1. Where no negligence was shown.
2. Where the condition was of a permanent nature and resulted from natural causes.
3. Where the danger of injury was certain and immediate and practically unavoidable.

A decision that there can be no recovery where there is no negligence at all and where the ice was formed from natural causes, as in *Missouri, Pac. R. Co.* v. *Aeby*, 275 U. S. 426, and *Hatton* v. *New York N. H. & H. R. Co.*, 261 F. 667, is not at all a precedent for holding that petitioner in the case at bar assumed the risk from ice negligently created by affirmative conduct. In the *Aeby* case this Court said that absent negligence, "We need not consider its contentions in respect of assumption of risk * * *."

The other cases cited in the opinion below, namely, *Seaboard Airline* v. *Horton*, 233 U. S. 492, *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, and *Boldt* v. *Pennsylvania R. Co.*, 245 U. S. 441, all concerned the propriety of requested instructions, *and in none of them was it held that assumption of risk appeared as a matter of law.* In two of them the verdict of the jury was actually sustained and in the other case a reversal resulted from erroneous instructions. A mere reading of the opinions will disclose that none is authority here on the facts.

Petitioner Was Entitled to an Opportunity for Deliberation, Choice and Assent.

The authorities hereafter cited and discussed indicate that a railroad employe circumstanced as petitioner is entitled to an opportunity to complain to the Master of the dangerous condition before being confronted with the alternative of abandoning the service. Confronted with the situation, petitioner might have attempted to make the

place safe or to do the work in a different manner, for example, without standing on the ice. His failure to select a different course from that actually pursued would amount only to contributory negligence. Failing that, he is not required immediately to walk off the engine and abandon the service. In fact, his duty to his employer and to the public is otherwise. Because as said in 3 Labatt, Master and Servant, (2d Ed.) Sec. 1216, p. 3303, "The case of a railway servant stands upon a special footing as he is deemed to owe a duty to the public as well as his employers, and the effect of the decision, as a whole, is that he is justified in taking much greater risks than employes in other occupations, without necessarily forfeiting his right of action. Under ordinary circumstances, such a servant seems to be, at all events, entitled to remain at work until he obtains an opportunity to notify the proper agent of the master as to the existence of the danger."

In *C., N. O. & T. P. Ry. Co.* v. *Thompson*, (6 Cir.) 236 F. 1, it was said:

> "The sole basis thereof is knowledge of the risk at the time of entering into the employment or obtained subsequently under such circumstances that there is freedom of choice as to remaining in the employment before incurring it."

In *Kane* v. *Northern Central Ry. Co.*, 128 U. S. 91, with respect to the conduct of a brakeman who remained in service with knowledge that a step was missing from one of the cars, "An employe upon a railroad train, likely to meet other trains, owes it to the public, as well as to his employer, not to abandon his post unnecessarily."

The question was held to be for the jury in *Southern Pac. R. Co.* v. *Yeargin*, 109 F. 436, Cert. den. 183 U. S. 695, where the Court said:

"Whether he acted with ordinary prudence in remaining in the defendant's service with the knowledge which he had acquired of the insufficient equipment of the helper engines, is the true test by which to determine whether he assumed the particular risk, and released the railroad company from liability for the nonperformance of the duty to supply proper equipment which the law devolved upon it."

Before *Volenti non fit injuria* should constitute a defense there must be an opportunity for the servant to decide whether or not to go on with the work and there must be time for real deliberation and an estimate of the comparative advantages and disadvantages. 3 Labatt, Master and Servant, (2d Ed.) Sec. 1304, p. 3660. Assumption of risk being contractual implies choice and freedom of consent, and before choice can be implied, there must be an opportunity to choose. *Louisville & N. R. Co.* v. *Dobbs*, 38 Ga. App. 239, 143 S. E. 601. As said in *Olney* v. *Boston & M. Ry. Co.*, 71 N. H. 427, 52 A. 1097:

"Continuance in service with knowledge of the risk is generally conclusive evidence of the servant's agreement to assume it. *Collins* v. *Carr Co.*, 68 N. H. 196, 38 A. 1047. When, after discovery of the defect, the servant has no opportunity to leave the service before the injury is received, there is no ground for the legal implication of such a contract. *Casey* v. *Ry. Co.*, 68 N. H. 162, 44 A. 92, *Dempsey* v. *Sawyer*, 95 Me. 295, 49 A. 1035. The voluntary assent of the servant is essential to the contract."

The applicable principle is stated in 1 Shearman and Redfield, Negligence, 6 Ed., Sec. 211, as follows:

"The true rule, as nearly as it can be stated, is that a servant can recover for an injury suffered from

defects due to the master's fault, of which he had notice, if, under all the circumstances, a servant of ordinary prudence, acting with such prudence, would, under similar conditions, have been justified in continuing the same work under the same risk; but not otherwise. * * * If every servant on a railroad or in a factory should refuse to work by the side of a negligent fellow servant or with defective materials, immediately upon becoming aware of the fact such enterprises could never be carried on. Obviously, a reasonable time must be given for removal of the defect, and meantime, the business must be carried on with no prejudice to the servant's rights, unless the risk is so great that no one, acting with ordinary prudence would go on under the circumstances."

Everyone from time to time has occasion to walk upon icy sidewalks or the icy steps of his home, sometimes carefully and sometimes carelessly, but it is seldom that anyone absolutely refuses to walk over an icy area to accomplish his object. Prudence or negligence in doing so should be considered an issue of fact for the jury, especially where; as here, the conduct of a railroad trainman on duty is under judicial scrutiny.

The applicable rule is well stated in White on "Personal Injuries on Railroads," Volume 1, p. 377, that knowledge of the defect and failure to complain will not always work an assumption of risk "for the employe may have had reasonable ground to believe by the exercise of due care on his part that he could use the defective appliance without a resulting injury."

The following facts in the case at bar fully justified the trial Court in submitting the case to the jury:

1. The condition was not *necessarily* dangerous nor certain to result in injury.

2. Petitioner's knowledge was so closely connected in point of time and action that there was no appreciable interval.

3. Petitioner had no opportunity to object to the master.

4. There was no evidence that petitioner freely and voluntarily consented to the condition.

5. The petitioner was under a duty not to delay the train and hence not to abandon that one, single task.

6. The unexpected release of the hook from the water spout acted in conjunction with the ice under his feet to cause the accident.

A realistic view constrains us to believe that had petitioner sought out the engineer or conductor to make a complaint, he would have been peremptorily admonished (probably with a generous admixture of profanity) to return to his task and to perform his duties with dispatch so that the train could leave at the appointed time.

Petitioner was not asked why he did not abandon the job and make a complaint, or whether he intended to do so upon filling the tank with water, or whether he continued with the work and completed the task in order to enable the train to depart on schedule, or whether the believed he could pull the spout over and into the manhole without slipping, or whether he acted under some exigency or constraint of some kind. The silence of the Record on these points militates against the party having the onus on this issue, that is, the respondent.

D.

Assumed risk not available to defendant.

2. The amendment of 1939 was retroactive and the defense of assumed risk was not available.

We have demonstrated in the preceding subdivision of this brief that even were the defense of assumed risk available to respondent, it was properly submitted to the jury along with the issue of contributory negligence, and the evidence abundantly sustains the verdict. Therefore, whether the amendment be retroactive or not, the decision of the jury has foreclosed the issue in favor of petitioner.

But the Federal Employers' Liability Act (April 22, 1908, c. 149, Sec. 1; 35 Stat. 65) provided that, "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The words "shall be liable" imported an absolute liability where there was negligence, without the defense of contributory negligence or assumption of risk. However, the courts by way of interpretation retained the old defense of assumption of risk and in order to make its original intention clear, Congress by an amendment effective August 11th, 1939 (45 U. S. C. A. 54, Cumulative Pocket Part) provided:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this

chapter to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where *such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employes of such carrier; and no employe shall be held to have assumed the risks of his employment in any case where* the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe." (Amended part in italics:)

It should be noted that in the original Employers' Liability Act Congress in Sec. 3 thereof provided that contributory negligence should not bar a recovery but should only diminish damages. The original Act was silent with reference to assumption of risk. Because the courts by a sort of judicial atavism retained the common law defense of assumption of risk, it became necessary for Congress by the amendment to make clear its original intent. The amendment, of course, has now become a part of the original Act.

Reference was recently made by Mr. Justice Jackson in *Miles* v. *Ill. Cent. R. Co.*, 62 S. Ct. 827, to the "medieval system" of compensating railroad employes, and one of the relics of this feudal and "backward" system was the ancient and barbarous doctrine of assumption of risk now happily abolished in all cases. Presumably when Congress acted to eliminate this defense, it did so with the purpose of promoting justice in all cases to which its power would extend. The cruelty of the defense had been the subject of much comment by judges, sociologists and law writers generally. The action of Congress was remedial; the legislation cannot be otherwise classified; and no good reason appears why the benefits of a wise and human amendment

should be unnecessarily restricted, but on the contrary it should received a liberal interpretation to effectuate its object and purpose. Essentially the question is one of ascertainment of the Congressional intent.

This amendment became effective while this case was pending on appeal in the Appellate Court (R. 9). The section refers not to accidents or causes of action but to actions "brought" against common carriers. The language is, "That in any action brought * * *." Brought is in the past tense, and Congress did not limit the section to actions "to be brought," or "to be commenced," nor to "actions arising hereafter," etc.

That retrospective operation was intended by Congress is evidenced by the fact that Section 3 of the original Federal Employers' Liability Act (April 22, 1908, c. 149, Sec. 3; 35 Stat. 66) provides; "In all actions hereafter brought * * *."

Where the words employed were "shall arise" and "shall be commenced," it was held in *Link* v. *Receivers of Seaboard Airline Ry. Co.*, (4 Cir.) 73 F. (2d) 149, that, "The use of the future tense in these two vital sections effectually negatives any suggestion that the section was intended to apply retroactively." By the same reasoning the use of the past tense in the word "brought" indicates retrospective operation.

In *Hine* v. *Belden*, 29 Conn. 384, it was held that the use of the word "brought" "implies past time, and includes prosecutions pending as well as those thereafter to be brought."

The Court below erroneously decided that the defense of assumed risk was a vested right (R. 139) and, therefore, could not be eliminated by retroactive legislation. This resulted from a misapprehension as to the true rule estab-

lished by the decisions of this Court which held in *Arizona Copper Co.* v. *Hammer*, 250 U. S. 400:

> "No person has a vested right, entitling him to have unchanged the existing rules of law concerning an employer's responsibility for personal injury or death of an employe."

In the *Arizona* case, this Court had under consideration a state statute making employers liable for accidental injury to servants not themselves negligent which deprived the master of all common law defenses such as assumed risk and contributory negligence. The question here is not one of legislative power because no person can acquire a vested right in the rules of the common law except with respect to property. The distinction between a defense which is a vested right and one which is not was foreshadowed in *Campbell* v. *Holt*, 115 U. S. 620, involving a legislative act which in effect revived a cause of action and the Court said:

> "It is much insisted that this right to defense is a vested right, and a right of property which is protected by the provisions of the fourteenth amendment. It is to be observed that the words 'vested right' are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. • • •
>
> "We are unable to see how a man can be said to have *property* in the bar of the statute as a defense to his promise to pay. In the most liberal extension of the use of the word 'property' to choses in action, to incorporeal rights, it is new to call the defense of lapse of time to the obligation to pay money, property. It is no natural right. It is the creation of conventional law."

Paraphrasing this language, the defense of assumed risk is not property; it is no natural right; it is the creation of conventional law. That a defense like contributory negligence may be abolished by constitutional or legislative action, see also *C. R. I. & P. R. Co.* v. *Cole*, 251 U. S. 54, following the Arizona employers' liability case.

While not otherwise in point, the language of *Levy* v. *Birnschein*, 206 Wis. 486, 240 N. W. 140, is pertinent:

> "'Legislative acts remedial in their nature are frequently construed so as to act retrospectively and amendments to existing laws to strengthen legislative effort to correct abuses are to be so applied and construed as to suppress the mischief and advance the remedy."

A remedial statute is usually defined as one for the redress of grievances or which grants a remedy for the protection of rights. Under universal rules they are liberally construed and will be given a retrospective operation whenever such seems to have been the intention of the legislature. Lewis Sutherland, Statutory Construction, Vol. 2, p. 1227, states that, "General words in remedial statutes may be applied to past transactions and pending cases according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice." See, also, Cooley, Principles of Constitutional Law, 3d Ed., p. 360-1, where the author states:

> "The citizen has no vested right to any particular remedy, and the state may therefore take away at discretion those it provides and substitute others which shall apply to wrongs already committed as well as those which may thereafter be committed."

The fact that the action had already been commenced is immaterial because as said in *McGuire* v. *Cunningham*, 80

Cal. 553, 22 P. 839, "It has been held in a number of cases that statutes affecting procedure or allowing a new remedy for enforcing existing rights are justly and properly applicable to actions pending when such statutes became effective." Nor does the fact that an appeal was pending prevent the application of the amended law. In the opinion of Justice Reed in *Vandenbark* v. *Owens-Ill. Glass Co.*, 311 U. S. 538, the language of Chief Justice Marshall was quoted with approval that:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."

The judgment, herein, of course, had not become final and, therefore, the language of *Wall* v. *Chesapeake & O. Ry. Co.*, 290 Ill. 227, 125 N. E. 20, is applicable that:

> "If a case is appealed and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when its decision is rendered. * * * This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to pronounce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court had been withdrawn by an absolute repeal."

See also *U. S.* v. *Schooner Peggy*, 1 Cranch 103; *South Carolina* v. *Gaillard*, 101 U. S. 433; *Ewell* v. *Daggs*, 108

U. S. 143; *Railroad* v. *Grant*, 98 U. S. 398; *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23.

The state authorities holding that remedial legislation of various types may and should be given a liberal, retrospective operation are too numerous to discuss or quote from in this brief. A few scattered citations will suffice:

Dehan v. *Hotel & Restaurant Employes, etc.*, (La. App.) 159 So. 637.

DeMarse v. *Bruckman*, 298 N. Y. S. 736.

Bruton et ux v. *Tex. Power & Light Co.*, (Tex. Civ. App.) 44 S. W. (2d) 462.

Hoffman v. *Hoffman*, 26 Ala. 545.

Masedo v. *Masedo*, 29 Cal. App. 552, 84 P. (2d) 552.

Rossville Commercial Alcohol Corp. v. *Dennis Sheean Transfer Co.*, 18 La. App. 725, 138 So. 183.

Bartley v. *Boston, etc. Ry.*, 198 Mass. 163, 83 N. E. 1093.

VII.

CONCLUSION.

Nothing occurred upon the trial of this cause to arouse any passion or prejudice. The defendant, represented by able and experienced counsel, had the opportunity of presenting all of its arguments and evidence to the court and jury. The trial judge presided with dignity and impartiality. Under such circumstances the American jury system operates at its best, and especially at a time like the present, quotations from our courts concerning the object and purpose of a jury trial can well bear frequent repetition. The issues in the case at bar were of a character to per-

mit a just and intelligent decision by a jury composed of men operating or working in banks, factories, stores and business establishments, who certainly have had at least as much and probably a great deal more experience with the problems presented by ice upon their premises than the most wise and learned jurists.

Concerning the American jury system, it has been said:

1873

"Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain." *R. R. Company* v. *Stout*, 17 Wallace 657, 663.

1894

"We are constrained to hold that the provision of our Constitution, which gives parties to an action at law a right to a trial by jury, embraces even parties who bring actions at law against railroad corporations, and that the persistent effort to push precedents to the point of requiring trial judges to decide as questions of law the issues most commonly joined in cases where recovery for personal injuries is sought should not be encouraged." *New Orleans & N. E. R. Co.* v. *Thomas* (5th Cir.), 60 F. 379.

1942

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of

Federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob* v. *City of New York*, 62 S. Ct. 854.

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